VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Ch. 151

Re:	*Steven L. Reynolds and Harold and Eleanor Cadreact*	Land Use Permit Application #4C1117-EB

Findings of Fact, Conclusions of Law, and Order

This matter involves an appeal by Steven L. Reynolds (Reynolds) to the Environmental Board (Board) from Findings of Fact, Conclusions of Law, and Order (Decision), issued by the District 4 Environmental Commission (Commission) to Reynolds and Harold and Eleanor Cadreact, denying Land Use Permit Application #4C1117 (Application), which seeks authorization for a 36-lot subdivision with related infrastructure on a tract of land in the Town of Milton, Vermont (Project).

I. History

On September 23, 2003, the Commission issued the Decision denying the Application.

On October 16, 2003, Reynolds filed an appeal with the Board from the Decision alleging error with respect to 10 V.S.A. §6086(a)(1)(B), (8), and (9)(B).

On November 25, 2003, Board Chair Patricia Moulton Powden convened a Prehearing Conference and on December 2, 2003, the Chair issued a Prehearing Conference Report and Order.

On February 11, 2004, the Board held a hearing in this matter; only Reynolds, by John R. Ponsetto, Esq. participated.

The Board deliberated on March 17, April 21 and May 19, 2004. This matter is now ready for decision.

II. Issues

The issues in this matter are:

1. Whether the Project satisfies 10 V.S.A. §6086(a)(1)(B).

2. Whether the Project satisfies 10 V.S.A. §6086(a)(8) (archeological resources).

3. Whether the Project satisfies 10 V.S.A. §6086(a)(9)(B).

III. Facts

To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. *See, Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corporation*, 167 Vt. 228, 241-42 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983).

1. The Project is a 36-lot residential subdivision on a 45+/- acre parcel in Milton, Vermont.

2. The Project is in five phases: Phase I: Lots 1 - 8; Phase II: Lots 9 - 15; Phase III: Lots 16 - 24, and an undeveloped lot containing the stormwater detention basin; Phase IV: Lots 25 - 31; Phase V: Lots 33 - 36.

3. Project lots are about ½ acre in size, except for lot 36 which is 20 acres.

Criterion 1(B)

4. The Project will dispose of wastewater through the municipal sewer system.

5. The Agency of Natural Resources (ANR) issued Wastewater System and Potable Water Supply Permit #WW-4-1839 on November 3, 2003.

6. Stormwater is collected and drained toward the Project's lower meadow and into a stormwater detention basin, before flowing into a tributary of Mallet's Creek.

7. ANR issued Authorization to Discharge Under General Permit 3-9015 on September 4, 2003.

8. Project stormwater will not reach Gertrude Kristiansen's[1] property.

Criterion 8

9. There are archeological sites on lots 34, 35 and 36 of Phase V of the Project; there are no known archeological sites on other Project lots.

10. Development of lots 34, 35 and 36 has the potential to destroy the archeological sites on those lots.

[1] Ms. Kristiansen sought and was granted party status as to Criterion 1(B) in this matter, but she filed no testimony and did not appear at the hearing.

Criterion 9(B)

11. The 45-acre Project site contains 24.1 acres of primary agricultural soils in the upper meadow fronting Westford Road and 5.1 acres of primary agricultural soils in the lower meadow fronting East Road.

12. The 35 lots in the upper meadow of the Project will destroy or significantly reduce the agricultural potential of 24.1 acres of the 29.2 acres of primary agricultural soils.

13. The driveway to lot 36 will impact primary agricultural soils. Four acres of primary agricultural soils on lot 36 will be preserved.

14. Reynolds has chosen not to attempt to satisfy Criterion 9(B) through off-site mitigation because of the expenses associated with this process.

15. In 2000, Reynolds entered into a Purchase and Sales Agreement with Harold and Eleanor Cadreact to purchase the Project site for $540,000, contingent upon Reynolds obtaining approval for permits for his Project; if the number of approved lots is less than 36, this figure is reduced by approximately $14,500 per lot.

16. The Town of Milton assesses the Project site land at $93,300; adjusted by the equalization rate, the value would be $116,625.

17. The Project site has been appraised at $575,000.

18. There are no other nonagricultural or secondary agricultural soils owned or controlled by Reynolds or the Cadreacts reasonably suited to the Project.

19. The Project has not been clustered on the Project site so as to avoid the large majority of the primary agricultural soils on the site.

20. The Town of Milton has divided its Town into three density tiers: high growth, middle growth, and low growth districts; minimum lot sizes are 5,000 - 40,000 square feet in the high growth tier, 40,000 - 120,000 square feet in the middle tier, and 400,000 - 600,000 square feet in the low growth tier.

21. The Project lies within the Old Towne Residential district of the Town of Milton's Downtown Planning Areas, in a transition area between the high and middle growth tiers.

22. Seventy-two percent of Milton’s land is in the Agricultural and Forestry Districts.

23. Minimum lot size in Agricultural/Rural Residential District is 9.2 acres, which promotes the preservation of primary agricultural soils.

24. Planned Residential Developments (PRDs) are allowed and encouraged, but not required, in the Town of Milton's Agricultural/Rural Residential District.

25. Milton's Zoning Regulations provide that, for PRDs in the Agricultural/Rural Residential District, a key goal "shall be to retain rural community characteristics…. Included within the realm of rural community character is the preservation of existing farms and prime agricultural soils…."

26. Neither the Milton Town Plan nor the Milton Zoning Regulations prohibit, as a condition for the approval of a development or subdivision, the development of agricultural lands, even in the Town's Agricultural/ Rural Residential District.

27. There is one example of a farm having been preserved in the Town of Milton through the Vermont Land Trust.

28. The Project will not significantly interfere with or jeopardize the continuation of agricultural operations on the adjoining lands.

IV. Conclusions of Law

A. Criterion 1(B) (waste disposal)

Criterion 1(B) requires demonstration that project complies with applicable Health Department and Department of Environmental Conservation (DEC) regulations regarding disposal of wastes and that project will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells. *Re: Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 71 (Dec. 8, 2000); *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB(Altered), Findings of Fact, Conclusions of Law, and Order at 19 (Jul. 20, 2000).

The burden of proof for Criterion 1(B) is on the applicant. 10 V.S.A. §6088(a); *In re Wildlife Wonderland, Inc*., 133 Vt. 507, 511 (1975), *In re Barker Sargent Corp*., 132 Vt. 42, 46 (1973); *Barre Granite, supra,* at 67.

ANR has issued Wastewater System and Potable Water Supply Permit #WW-4-1839 (issued on November 3, 2003). Further, stormwater has been addressed through the ANR's Authorization to Discharge Under General Permit 3-9015 issued on September 4, 2003. These permits create a rebuttable presumption that the Project

will comply with Criterion 1(B).[2] *Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised), Findings of Fact, Conclusions of Law, and Order at 22 - 23 (Aug. 19, 1996).

No evidence has been submitted to rebut the presumption created by the ANR permits. The Board concludes that the Project satisfies Criterion 1(B).

B. Criterion 8 (archeological resources)

To determine compliance with Criterion 8 (historic sites) Board applies three-stage analysis: (i) whether the project site is or contains a historic site, (ii) whether the project will have an adverse effect on such historic site, and (iii) whether such adverse effect will be undue. *Re: Manchester Commons Associates*, #8B0500-EB (Sep. 29, 1995).

The only archeological sites on the Project site appear on lots 34, 35 and 36, all of which are in Phase V of the Project.[3] Reynolds agrees not to develop Phase V until further studies are made.

The Board concludes that Phases III and IV satisfy Criterion 8 (archeological resources). It cannot conclude, at this time, that the development of Phase V meets this Criterion. Any decision as to Phase V must be held in abeyance until the requisite studies occur and are reviewed by the parties and the Commission.

C. Criterion 9(B)

Before issuing a permit for the development or subdivision of primary agricultural soils, the Board must find that the project "will not significantly reduce the agricultural potential of the primary agricultural soils," or that

> (i) the applicant can realize a reasonable return on the fair market value of his land only by devoting the primary agricultural soils to uses which will significantly reduce their agricultural potential; and

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[2] The Commission denied the Application because, at the time of the Commission's decision, no ANR permits for the Project had been issued and therefore no presumption of compliance with Criterion 1(B) existed.

[3] The Commission permitted Phases I and II of the Project, but denied any development of Phases III - V without further archeological study. It appears that this denial was based upon an early map which inaccurately showed archeological sites on lots within Phases III and IV. Later information from the Division of Historic Preservation indicates that such sites exist only on the Phase V lots.

(ii) there are no nonagricultural or secondary agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose; and

(iii) the subdivision or development has been planned to minimize the reduction of agricultural potential by providing for reasonable population densities, reasonable rates of growth, and the use of cluster planning and new community planning designed to economize on the cost of roads, utilities and land usage; and

(iv) the development or subdivision will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential.

10 V.S.A. § 6086(a)(9)(B).

"Primary agricultural soils" are defined as:

Soils which have a potential for growing food and forage crops, are sufficiently well drained to allow sowing and harvesting with mechanized equipment, are well supplied with plant nutrients or highly responsive to the use of fertilizer, and have few limitations for cultivation or limitations which may be easily overcome. In order to qualify as primary agricultural soils, the average slope of the land containing such soils does not exceed 15 percent, and such land is of a size capable of supporting or contributing to an economic agricultural operation. If a tract of land includes other than primary agricultural soils, only the primary agricultural soils shall be affected by criteria relating specifically to such soils.

10 V.S.A. §6001(15).

The burden of proof under Criterion 9(B) is on Reynolds. 10 V.S.A. §6088(a).

1. The existence of primary agricultural soils at the Project Site.

In evaluating a project for conformance with Criterion 9(B), the Board must first determine whether the site contains primary agricultural soils. *Southwestern Vermont Health Care Corporation*, #8B0537-EB, Findings of Fact, Conclusions of Law, and Order at 37 (Feb. 22, 2001) (*SVHC*). Here, the 45-acre Project site contains 29.2 of primary agricultural soils - - 24.1 acres in the upper meadow fronting Westford Road and 5.1 acres in the lower meadow fronting East Road.

2. Reduction in agricultural potential of primary agricultural soils.

Once the Board has determined that the site contains primary agricultural soils, it must determine whether the Project would significantly reduce the agricultural potential of the soils. *SVHC, supra*\, at 37. "The Board interprets the word 'potential' to require a consideration of whether the design and location of the subdivision on the property will preclude agricultural use of the primary agricultural soils and not whether agricultural use of those soils is likely in light of current economics and surrounding land uses." *Re: Raymond Duff,* #5W0921-2R-EB (Revised), Findings of Fact, Conclusions of Law & Order at 13 (June 14, 1991).

The 35 lots in the upper meadow of the Project will significantly reduce the agricultural potential of 24.1 acres of the 29.2 acres of primary agricultural soils. The driveway to lot 36 will also impact primary agricultural soils, although four acres of primary agricultural soils on lot 36 will be preserved.

The loss of more than one-half of the primary agricultural soils on the site constitutes a significant reduction in the agricultural potential of such soils.

3. Subcriteria of Criterion 9(B)

As the Board has concluded that the Project significantly reduces the agricultural potential of the soils, the Board can reach an affirmative conclusion as to Criterion 9(B) only if Reynolds either engages in off-site mitigation under the standards established by the *SVHC* decision (which he has chosen not to do) or meets his burden as to the four subcriteria of 9(B).

a. Subcriterion (i)

Under subcriteria (i), an applicant must demonstrate that he "can realize a reasonable return on the fair market value of his land *only* by devoting the primary agricultural soils to uses which will significantly reduce their agricultural potential." 10 V.S.A. §6086(a)(9)(B)(i) (emphasis added). As the Board wrote in *Re: Thomas W. Bryant and John P. Skinner*, *supra*, at 26 and 28-29:

> [Subcriterion 9(B)(i)] requires that the Applicants demonstrate that they can realize a reasonable rate of return *only* by devoting the property to uses which will reduce the soils' potential. This criterion requires the computation of a fair market value for the property and the consideration of alternative land uses which will not significantly reduce the agricultural potential of the primary agricultural soils found on-site, including different designs for a residential or commercial project that use less of the primary agricultural soils. The rates of return from these alternative uses must then be related to the fair market value of the property. Evidence must

> also be provided concerning what is a reasonable rate of return for each specific proposal.

(Emphasis in original). *And see Re: Nile and Julie Duppstadt and John and Deborah Alden*, #4C1013(Corrected)-EB, Findings of Fact, Conclusions of Law, and Order at 39 - 40 (Apr. 30, 1999); *Homer and Marie Dubois,* #4C0614-3-EB, Findings of Fact, Conclusions of Law, and Order at 7 (May 5, 1988) (subcriterion (i) was not satisfied because the applicant could not demonstrate that there are no other economically feasible land uses which will not significantly reduce the agricultural potential of the soils).

In discussing subcriterion (i), the Board has also written:

> That provision does not ask for a comparison of monetary return if the site is used solely for agricultural purposes versus use for development as proposed in the application.
>
> Rather, the Applicants must demonstrate that there is *no land use through which they can secure a reasonable rate of return on their investment which does not significantly reduce agricultural potential.* For example, if a reasonable return could be secured by locating four single-family houses on two of the 10.3 acres, allowing the retention of the residual in agricultural production, then subcriterion (i) cannot be satisfied. It is the Applicants' burden to demonstrate that other agricultural and non-agricultural uses of the site which do not diminish the soil's potential will not afford the Applicants a reasonable return.

Re: Marvin T. Gurman, #3W0424-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Jun. 10, 1985) (emphasis added).

The Board has also made it clear that it does not compare rate of return from development against such return from agricultural use in determining this subcriterion:

> Finally, we expressly reject the assertion … that because the land is potentially and immediately more valuable in nonagricultural development than it is in agricultural use, its conversion to a subdivision is sanctioned by the subcriterion. *The subcriterion is satisfied only when the applicant is unable to realize a reasonable return on the fair market value of his land in agricultural use.* We are not asked to determine what its relative value might be upon conversion if this development plan were to succeed.

Re: Richard and Napoleon LaBrecque, #6G0217-EB, Findings of Fact, Conclusions of Law, and Order at 6 (Nov. 17, 1980) (emphasis added).

> Thus, a "reasonable rate of return" does not mean the highest rate of return possible for a particular parcel, but only that a reasonable return on the fair market value of the property is obtainable through agricultural or other uses that will not result in the significant reduction of the primary agricultural soils at the project site.

SVHC, supra, at 47.

The burden is on Reynolds to provide the evidence to satisfy the requirements of subcriterion (i). 10 V.S.A. §6088(a); *Duppstadt, supra, at 40.*

Any analysis of subcriterion (i) requires the calculation of the rate of return that can be reasonably obtained by putting the Project tract to agricultural uses; only by engaging in this analysis can the Board determine whether a proposed project is the *only* one which can provide an applicant with a reasonable rate of return on the property's value. *Re: Thomas W. Bryant and John P. Skinner*, *supra.*

Two of Reynolds' witnesses, Anthony Stout and Robert Bancroft, testified as to subcriterion (i), specifically, the returns available from agricultural uses of the property. The Board, however, questions the credibility of their testimony.

Although he testified extensively as to agricultural economics Mr. Stout's resume shows no particular expertise in this area. The Board notes that Mr. Stout misused certain data taken from *Sustainable Vegetable Production From Start-up to Market* (*SVPSM*), a book written by Dr. Vernon Grubinger,[4] and, when considered with other aspects of Mr. Stout's testimony,[5] the Board thus concludes that Reynolds has failed to support his position as to possible agricultural returns from the Project site.

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[4] Dr. Grubinger is a Professor within the University of Vermont's Agricultural Extension program and the Director of the Center for Sustainable Agriculture.

[5] In particular, the Board does not find credible particular parts of Mr. Stout's testimony: on Board questioning, Mr. Stout conceded that the row entitled "Veges per SVPSM" in Exhibit R27, *Sensitivity Analysis*, is not, as purported to be, a factor taken from *SVPSM*, but rather represents Mr. Stout's own manipulation of data. It is also apparent that Mr. Stout's calculations used 1996 New Jersey data based on his unsubstantiated belief that Dr. Grubinger's more recent Vermont data must be too high.

Nor does the Board find credible Mr. Stout's estimates as to the costs ($186,000) to construct a drainage system and pond. Mr. Stout did not know of or consider the Environmental Quality Incentive Programs (*EQUIP)* program, which would allow a substantial rebate on the construction costs of the drainage system and pond.

While Reynolds's agricultural expert, Robert Bancroft, holds MS and PhD degrees in Agricultural Economics, his resume presents no publications relative to vegetable crops, small farms, or comparative cost analyses. Further, Dr. Bancroft exhibited limited knowledge of several fields relevant to subcriterion (i), including organic agriculture;[6] mechanisms for increasing per acre profit; and federal programs designed to assist farmers.[7]

It is also apparent that Stout and Bancroft, working together on the data about farming, chose to use or adjust some data items from *SVPSM* and not others.[8] For example, while Dr. Bancroft increased (to $8/hour) the labor costs associated with the production of some crops from the 1999 costs listed in *SVPSM*, he did not make a corresponding increase to the sales prices of those crops, because he did not have knowledge of sales prices. Further, while Dr. Bancroft's exhibits indicate that *SVPSM* shows enterprise budget sheets on a number of crops, which if grown in a mixed vegetable berry farm, could give profits per acre in the range of $9,400 for potatoes, $5,400 for garlic, $5,000 for musk melons, and $3,300 for broccoli, his reasons for discounting these figures - that such crops were grown and marketed as specialty crops, that high prices result from "flavor of the week" trends which return temporarily high prices but later collapse, and that the numbers in *SVPSM* are unusually optimistic - are not wholly convincing or credible, especially when he and Mr. Stout chose to use data from *SVPSM* to support his position in this appeal.

Thus, the Board finds that the testimony of Reynolds' witnesses as to low projected returns from agricultural products that could be raised at the Project site is

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[6] For example, Dr. Bancroft did not know that organic farming in Vermont increased by 22% in recent years, or that it was typical for organic farmers to net per acre profits of $5,000; nor did Dr. Bancroft know the difference in profit potential between organic and non-organic crops.

[7] Dr. Bancroft demonstrated no knowledge of federal programs available to help farmers with crop insurance, conservation, drainage and irrigation (the *EQUIP* program), or cost sharing, such as the Natural Resource Conservation Service; had he wanted to show how agriculture could be profitable on these soils, he could have built budgets using federal cost share information, which provide funding at 75% for most farmers and even higher funding for those in transition to organic agriculture.

[8] Similarly, the table labeled "Net Crop Budgets, 2000, Vermont Extension Service, SVPSM" in Exhibit R32, *Crop Values Sheet,* is Dr. Bancroft's adjustment to Dr. Grubinger's data; in fact, only the "net receipts as published" column is actually from *SVPSM.*

neither persuasive nor credible.[9] The Board therefore concludes that Reynolds has not met its evidentiary burden with respect to subcriterion (i) of Criterion 9(B).

b. Subcriterion (ii)

Under this subcriterion, Reynolds/Cadreact must demonstrate that there are no nonagricultural or secondary agricultural soils owned or controlled by it reasonably suited to the Project. 10 V.S.A. §6086(a)(9)(B)(ii).

The findings in this case are that no such lands exist; the Board therefore concludes that Reynolds has met this subcriterion.

c. Subcriterion (iii)

Subcriterion 9(B)(iii) requires that

> (iii) the subdivision or development has been planned to minimize the reduction of agricultural potential by providing for reasonable population densities, reasonable rates of growth, and the use of cluster planning and new community planning designed to economize on the cost of roads, utilities and land usage.

Fragmentation of agricultural land was one of the deciding factors in *Duppstadt*:

> The evidence demonstrates that the Applicants have designed this Project to utilize all developable portions of the Project Site for single family home sites on separate lots and related roadways. While the Applicants claim the Project is a cluster design, this Board has made it clear that it views "[d]etached single family homes on separate lots [as] the antithesis of cluster planning and [that such a design] do[es] nothing to economize on land usage for the purpose of minimizing the reduction of the agricultural potential." (Citations omitted)

Duppstadt, supra, at 40.

As planned, the Project will develop 25.1 acres of the 29.2 acres (86%) of primary agricultural soils. The four-acre parcel in the lower meadow will be preserved.

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[9] Unfortunately, questions concerning the reliability of Stout's testimony are compounded when it is used to form the basis for Bancroft's conclusions. For example, Bancroft, relying on calculations made and conclusions drawn by Stout, states that a "net $/acre" value for crop yield resulting from *SVPSM* data is $1822; this number is not directly from *SVPSM*, but is, rather, a number generated by Bancroft.

i. Reynolds' arguments

Reynolds presents several novel arguments as to why clustering should not be required in this instance.

A. *that the clustering requirements of subcriterion (iii) are subservient to the return on market value language in subcriterion (i)*

Reynolds notes that a series of clustering options were considered and rejected. One option was rejected because it would fragment the land in violation of the *Duppstadt* standards. Another option was rejected because smaller lots make the Project less profitable. Still another (increasing density) was rejected because Milton's planning director would not support it. The statute, however, does not allow an applicant to satisfy subcriterion (iii) by considering, but then rejecting, options to the applicant's desired development of a project site.

As a part of his position regarding the rejection of alternative options, however, Reynolds contends that, because subcriterion (i) guarantees him "the right to a reasonable return" on his land, the clustering requirements of subcriterion (iii) (and, apparently, even the Criterion itself) must be balanced against - and subservient to - his interests in obtaining this return. He states:

> It is Reynolds' position that it was the Legislature's intent in enacting criterion 9(B) to preserve primary agricultural soils *but only to the extent that the landowner would be able to realize a reasonable return on the fair market value of his land.* The landowner's duty to minimize the use of and impact on prime agricultural soils under subcriteria (ii), (iii) and (iv) *is to be limited by the landowner's right to a reasonable return on the fair market value of his land as guaranteed by subcriteria (i).*

Letter to Board Chair Patricia Moulton Powden from John Ponsetto, Esq., (Feb. 27, 2004), at 2 - 3 (emphasis added) (*Ponsetto Letter)*.

To support this claim that subcriterion (i) trumps its companion provisions, Reynolds directs the Board's attention to various passages in a transcript from Jonathan Brownell's 1973 testimony on Criterion 9(B) before the Senate Judiciary Committee.[10] As Reynolds argues, Mr. Brownell's remarks before the Judiciary

[10] The Board notes that resort to legislative history is unwarranted (and indeed generally not permitted) when there is no ambiguity in the plain words of the statute. *In re Margaret Susan P.*, 169 Vt. 252, 263 (1999) (only where statutory language is "unclear and ambiguous" may legislative history be used to determine legislative intent. *In re Burlington Housing Auth*., 143 Vt. 80, 83 (1983).

Committee were focused on a perception that Act 250 must tread carefully on restricting a person's use of his land in order to avoid a constitutional takings claim.

The Board rejects this argument on three grounds.

Takings

First, while it is evident that subcriterion (i) does recognize a landowner 's entitlement to obtain a reasonable return on his land's value, the subcriterion does not guarantee such landowner the right to use his land in any way that he chooses, irrespective of its impacts on primary agricultural soils. Rather, the subcriterion requires the landowner to prove that *only* by significantly reducing the potential of the site's primary agricultural soils can a reasonable return be achieved. Thus, if other, less agriculturally destructive uses can be made of the land that will provide such a return, then the proposed project need not be approved under subcriterion (i).

This reading of subcriterion (i) is entirely consistent with takings law. The Vermont Supreme Court has held that a taking occurs only when a person has lost "all economically beneficial use of [his] land." *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 533 (2000), citing *Chioffi v. City of Winooski*, 165 Vt. 37, 41(1996) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). To the extent that the land can be used in other, economically beneficial ways, no taking occurs when Criterion 9(B)(i) prohibits uses that have greater agricultural impacts.

Further, a primary question in any takings inquiry is whether state regulation of land use has interfered with a landowner's "reasonable investment-backed expectations" -- what project Reynolds could reasonably expect to be permitted on the Cadreact land. Here, Reynolds' expectations are colored by the fact that Act 250's criteria have been in existence for over 30 years, and Reynolds entered into his Project - and his agreement to purchase the Cadreact land - with full knowledge of Criterion 9(B)'s requirements and prohibitions. *See, Ruckelshaus v. Monsanto,* 467 U.S. 985, 1006 - 07 (1984) (whether expectations are reasonable will depend on the claimant's knowledge of the facts and law at the time the investment was made). As Judge Oakes wrote in *Southview Associates, Ltd. v. Bongartz et al*., 980 F.2d 84, 107 (2d. Cir. 1992), *cert. denied*, 507 U.S. 987 (1993):

> Furthermore, to the extent Southview's reasonable investment-backed expectations have been affected by the Board's actions, Southview could not have reasonably expected that its plans would have been permitted to proceed willy-nilly. Rigorous Act 250 review seems the norm, not the exception. The fact that Southview must now modify the configuration of its subdivision proposal if it wishes to obtain Act 250 approval does not, in my view, unduly interfere with its reasonable investment-backed expectations.

Lastly, it can be convincingly argued that no taking occurs when a landowner voluntarily subjects his property to a higher level of regulation. *See, Yee v. City of Escondido*, 503 U.S. 519 (1992). Because Act 250 jurisdiction attaches only to certain development or subdivision activities, Reynolds can choose to engage in a myriad of development activities that do not trigger Act 250 review. Thus, the mere fact that Criterion 9(B) may prevent Reynolds from developing the project site in the precise manner that has been proposed here does not mean that all economic use of the land has been lost. Again, as Judge Oakes wrote in *Southview*:

> Despite the Board's decision with respect to its application, and the alleged permanent designation of 44 acres of its property as deeryard, the Board's actions *have no effect on Southview's ability to use the parcel in a way that does not require Act 250 review*. The Board's decision leaves intact Southview's existing ability to 1) construct improvements for farming, logging or forestry, 10 V.S.A. §6001(3) (Supp. 1991) (an orchard or a Christmas tree farm may be possible); 2) construct residential or commercial improvements "involving" less than ten acres of the property, *id*., (an inn or private wooded estate, both common usages in the region, may be possible); 3) construct and sell up to nine homes, *id*., (provided such activity involves less than ten acres); 4) subdivide and sell up to nine lots, 10 V.S.A. §6001(19); *see* 10 V.S.A. §6081 (1984). Finally, Southview can make considerable recreational use of the land. For example, its owners can walk, camp, cross-country ski, snow-mobile, observe wildlife, and even hunt deer on this land.

Southview, *supra,* 980 F.2d at 107 (emphasis added).

The plain language of the statute

Second, unlike Criteria 8(A)(i) or 9(H), which can be satisfied if the scales tip in the applicant's direction in economic terms, *see, In re Southview Associates*, 153 Vt. 171, 178-79 (1989); *Green Meadows Center LLC, The Community Alliance, and SEVCA*, #2W0694-1-EB, Findings of Fact, Conclusions of Law, and Order at 37 (Dec. 21, 2000), there is no balancing test inherent in an analysis of the Criterion 9(B) subcriteria. The statute does not weigh a developer's desire to obtain a reasonable return on his land against the requirement that a project be "planned to minimize the reduction of agricultural potential" by clustering.[11] Rather, the legislature's use of the

[11] Indeed, under Reynolds' reading, the subcriteria would allow the destruction of agriculture on an adjoining farm, in clear contravention of subcriterion (iv), if this were to be the only way that a developer could obtain a reasonable return on his land. *Ponsetto Letter* at 4.

word "and" between each of the subcriteria indicates that *all* of the subcriteria must be met and that each of the subcriteria is of equal weight. Nothing in the Criterion 9(B) subcriteria *exempts* an applicant from compliance with subcriterion (iii), and there is certainly no language that can be read to mean that subcriterion (iii) must bend to subcriterion (i) whenever the two may be perceived to be in conflict.

Legislative testimony

Third, certain points relative to Reynolds' references to Mr. Brownell's testimony bear making. First, while it does appear, from the remarks of Mr. Brownell and Senator Daniels at pages 33 - 34 of the hearing transcript, that subcriterion (i) should provide "an escape from the cluster development," later on that same page Senator Daniels notes, "The regulations do not keep the developer from transferring the land from farm use to develop as long as he complies with these reasonable requirements about cluster."[12] The transcript thus contains some internal ambiguities. And, more importantly, while this testimony may have been considered in shaping the elements to be considered within Criterion 9(B), the plain language of the Criterion that the legislature ultimately adopted contains not even the slightest hint that the clustering requirements of subcriterion (iii) must, as Reynolds contends here, bow to a developer's quest for a "reasonable return." See, *In re Eastland, Inc*., 151 Vt. 497, 501 (1989) (the fact that the Legislature refrained from adopting the restrictive language urged by one legislator and instead explicitly selected words of broad reach indicates that it had no intention of adopting legislator's preferred meaning).

It is apparent that Brownell's legislative testimony addressed neither the "reasonable investment backed expectations" element of takings law nor the fact persons who seek to develop primary agricultural soils may do so in a way that does not trigger Act 250 review. Thus, the constitutional concerns expressed in his testimony should be given limited consideration.

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[12] The Board is also attentive to the United States Supreme Court's admonition that, "The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1978); and see, *United States v. O'Brien,* 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statue is not necessarily what motivates scores of others to enact it.") Further, our own Supreme Court has stated that, "[T]he remarks of a witness at a committee hearing are accorded little weight in determining the intent of the legislature in enacting a statute.'" *State v. Madison*, 163 Vt. 360, 373 (1995).

B. that the Town's planning efforts trump Act 250's goals

The Milton Town Planner testified that, if the Board were to require clustering, she does not know if the Project would obtain local DRB approval. She further noted that, because the Project is in a transition area, she states that she would recommend against local Development Review Board approval of a "higher density subdivision" at the Project site.

While the Board respects Milton's planning efforts, it is important to note that meeting the clustering requirements of subcriterion (iii) does not necessarily require that the Project be at a higher density than it is now. It could simply consist of fewer lots or the same number of smaller lots, surrounded by open space.

More importantly, while an Act 250 requirement that clustering occur might be in conflict with local requirements, this does not mean that the Board must abandon subcriterion (iii). The Vermont Supreme Court has written, "[W]here local regulation is in effect, a person proposing to subdivide or develop might have to gain approval both at the state and local levels ...."*In re Trono Construction Co.*, 146 Vt. 591, 593 (1986), quoting *Committee to Save Bishop's House, Inc. v. MCHV, Inc.*, 137 Vt. 142, 145 (1979); and see *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, Memorandum of Decision at 10 (Oct. 8, 2003).

Thus, the question is not whether the Board's responsibility to apply subcriterion (iii) should bend to meet local planning requirements; it is whether the Project can be designed so as to meet *both* requirements. Here, it is not clear that the Project cannot be designed so as to provide both (1) the transitional function that Milton appears to desire and (2) subcriterion (iii)'s requirement that a Project preserve primary agricultural soils.

C. that the use of the phrase "new community planning" means that the clustering requirements should be read to involve the entire town, not just the project site

Reynolds also contends that the language of subcriteria (iii) should be interpreted to include community-wide clustering, as advocated by one witness, Planner David Spitz.

> Nothing in subcriteria (iii) requires a lot-by-lot approach to clustering. In fact, the reference to "new community planning" which has come to mean "smart growth" strongly suggests that the old lot-by-lot

> approach must be replaced with the progressive community-wide clustering model.

Ponsetto Letter, at 7.

Reynolds presented testimony that the Town of Milton has, as many communities have, divided its Town into three density tiers: high growth, middle growth, and low growth districts; minimum lot sizes are 5000 - 40,000 square feet in the high growth tier, 40,000 - 120,000 square feet in the middle tier, and 400,000 - 600,000 square feet in the low growth tier. The Project is in a transition area between the high and middle growth tiers.

By encouraging growth in the high growth districts, Reynolds contends that this reduces development pressures in the low growth districts. Further, PRDs are permitted by Milton's regulations in the low growth Agricultural/Rural Residential District and one goal of PRDs is to cluster in order to preserve primary agricultural soils.[13] Concepts of clustering, he thus argues, should transcend property lines, so that the clustering accomplished by a project is considered as it relates to the town as a whole, and not as it may occur only within the project's boundaries.

The Board recognizes Milton's efforts to plan to promote high density growth in the areas where such growth should occur. But a serious difficulty arises when this planning is used as grounds to support a claim that clustering need not occur on the Project site itself.

The Board has consistently read subcriterion (iii) to require that the *Project* be clustered to reduce its impacts on the primary agricultural soils. *Duppstadt, supra,* at 40; *and see Southwestern Vermont Health Care Corp*., #8B0537-EB, Findings of Fact, Conclusions of Law, and Order at 50 (Feb. 22, 2001); *Thomas W. Bryant and John P. Skinner d/b/a J.O.T.O. Associates*, #4C0795-EB, Findings of Fact, Conclusions of Law, and Order (Jun. 26, 1991); *Spear Street Associates*, #4C0489-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 26, 1982), *aff'd*, *In re Spear Street Associates*, 145 Vt. 496 (1985). Indeed, the phrase, in subcriterion (iii), "*the subdivision or development* has been planned…" indicates a focus on planning at the project site of the subdivision or development itself, not on a project's location within the larger context of a town-wide plan.

The Board's reading of subcriterion (iii) is supported by the Vermont Supreme Court's decision in *In re Spear Street Associate*, *supra.* In affirming the Board's construction of subcriterion (iii), the Court wrote:

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[13] No specific evidence was presented, however, that there are any primary agricultural soils in this District.

> The Board had previously construed this subsection as requiring "*careful consideration of design alternatives that could reduce a project's impact on primary agricultural soils, and [requiring] adoption of a land-conserving design* when it is reasonable to do so." *In re C & K Brattleboro Associates,* No. 2W0434-EB (Vt. Environmental Bd., Jan. 2, 1980). "[A]bsent compelling indication of error, interpretations of statutory provisions by the administrative body responsible for their execution will be sustained on appeal." *In re Vermont Health Service Corp.,* [144 Vt. 617], 622-23 [1984)]. There being no indication that the Board's interpretation is in error, it is sustained. *It is thus incumbent upon the developer to demonstrate to the Board that its proposed development is designed to reduce the impact on primary agricultural soils. In the instant case, the Board believed that an alternative, less-destructive design might be reasonable*. In fact, the neighbors appealing to the Board presented an alternative plan. *The developer, however, failed to present evidence that the proposed development would minimize the impact on primary agricultural soils relative to other reasonable design alternatives*. The developer thus failed to satisfy his burden of proof, and the Board's determination must stand.

145 Vt. at 502 (emphasis added).

That the Board focuses on clustering within the Project site becomes apparent when one considers the means given to the Board to carry out the intent of Criterion 9(B). Through the implementation of Act 250's criteria and permit conditions, the Board can regulate activities that occur on lands which are subject to the Act's jurisdiction. In this case, only the Project site is subject to the Act's control; absent an action that triggers jurisdiction, the Board cannot dictate what may occur in other parts of the Town of Milton.

Thus, while the Milton regulations state that PRDs are permitted in the low growth districts, there is no guarantee that, when PRDs are built in those districts, any agricultural soils will actually be preserved. Nothing in Milton's regulations would prevent the development of all remaining primary agricultural soils within the Town or in the Agricultural/Rural Residential District. And even if Milton's regulations presently prohibited the loss of such soils, those regulations are beyond the Board's power to control and thus subject to amendment and change without the Board's approval.

Here, Reynolds has used 86% of all of the primary agricultural soils on the site for his housing lots; his Project design does little to attempt to reduce the impact *on*

the site's primary agricultural soils. And, to extend clustering beyond property lines would effectively negate the meaning of subcriterion (iii).[14]

The Board concludes that the Project does not satisfy subcriterion (iii) of Criterion 9(B).

d. Subcriterion (iv)

Subcriterion 9(B)(iv) requires the Board to determine whether the Project will not significantly interfere with or jeopardize the continuation of agricultural operations on the adjoining lands.

Based on its Finding that there are no farms in the neighborhood, the Board concludes that farming practices on adjoining lands would not be adversely affected by virtue of this Project.

4. Conclusion as to Criterion 9(B)

Where there are primary agricultural soils on the site, an applicant's failure to satisfy its burden as to any one of the four Criterion 9(B) subcriteria is sufficient to merit a denial. *In re Spear Street Associates*, *supra,* 145 Vt. at 501. The Board therefore concludes that the Project does not satisfy Criterion 9(B).

V. Order

1. The Project complies with 10 V.S.A. §6086(a)(1)(B).

2. Phases III and IV of the Project comply with Criterion 10 V.S.A. §6086(a)(8).

3. The Project complies with 10 V.S.A. §6086(a)(9)(B)(ii) or (iv); the Project does not comply with 10 V.S.A. §6086(a)(9)(B)(i) or (iii).

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[14] In its recent decision in *Re: Allen Brook Investments, LLC and Raymond Beaudry,* #4C1110-EB, Findings of Fact, Conclusions of Law, and Order (Jan. 27, 2004), the Board denied similar arguments to those asserted here -- that Allen Brook need not cluster on its project site, even though its site was within Williston's growth area.

4. Land Use Permit Application #4C1117-EB is denied.

5. Jurisdiction is returned to the District 4 Environmental Commission.

Dated at Montpelier, Vermont this 27th day of May 2004.

ENVIRONMENTAL BOARD

*/s/Patricia Moulton Powden*_____
Patricia Moulton Powden, Chair
George Holland
Samuel Lloyd
Donald Marsh
Alice Olenick
Patricia Nowak
Richard C. Pembroke, Sr.
Jean Richardson
Christopher D. Roy

Board Member Richardson was not present for the May 19, 2004 deliberation on this matter, but she has read this decision and concurs with its result.

Chair Moulton Powden, concurring:

I concur fully with the Board's decision. However, I need to state that, in general, I do not support the need to cluster to preserve agricultural soils in duly designated growth centers, in particular those in communities which have made a demonstrated effort to maintain historic settlements patterns and rural lands preservation. This position is reflected by my joining with the dissent in *Allen Brook Investments, LLC and Raymond Beaudry,* #4C1110-EB, Findings of Fact, Conclusions of Law, and Order (Jan. 27, 2004), which would not have required the developer in that matter to cluster to preserve agricultural soils.

However, the argument for not requiring clustering in this case is less compelling than in the *Allen Brook* case. In *Allen Brook*, the proposed project, located in a growth center, duly designated by the Town of Williston, could be clearly characterized as "in-fill;" it was surrounded on all sides by existing commercial or

residential development. In this case, the Project is located in a "transition" area on the outer edge of Milton's downtown. While there is residential development to the Project's north, rural lands lie to its south, its east, and its immediate vicinity to the west.

Further, in *Allen Brook*, there was evidence that the Town of Williston had taken measures through zoning and the creation of an Environmental Reserve Fund to preserve agricultural soils in other parts of the town. In Milton's case, there are no such measures in place. Agricultural soil preservation is to be accomplished, at best, through 10-acre zoning, which provides no guarantees that commercially viable farms will not eventually be subdivided for residential development.

Therefore, while I agree, as stated in the *Allen Brook* dissent and in the Board's seminal decision in *Southwestern Vermont Health Care Corporation*, #8B0537-EB, Findings of Fact, Conclusions of Law, and Order (Feb. 22, 2001), that we should not interpret Criterion 9(B) too narrowly, I do not believe that widening that interpretation is warranted in this case.

Lastly, I believe that there is substantial conflict between the goals of Act 200 to "plan development so as to maintain the historic settlement pattern of compact village and urban centers separated by rural countryside," 24 V.S.A. §4302(c)(1), and the provisions of Criterion 9(B)(iii), which require that subdivisions and developments must be planned to "minimize the reduction of agricultural potential by providing for … the use of cluster planning … designed to economize on … land usage." Act 200 takes a broad look at planning within the context of the town as a whole, whereas Board precedent holds that subcriterion (iii) applies only to the particular lands within Act 250's jurisdiction which have been proposed for subdivision or development. Although there were attempts during this legislative session to address this conflict, the Legislature failed to act, and I therefore consider myself bound by the law as presently written to require clustering on the Project tract in this matter.

Board Member Roy, concurring in part, dissenting in part:

I concur with the Board's decision that the Project complies with 10 V.S.A. §6086(a)(1), (8) and (9)(B)(ii) and (iv).

I dissent, however, with respect to the majority decision as to clustering under Criterion 9(B)(iii).

As the majority notes, *supra* at 16, Reynolds contends that the language of subcriteria (iii) should not be interpreted narrowly to require on-site clustering exclusively, but should be interpreted to allow satisfaction alternatively through community-wide "clustering."

It is undeniable that the long-standing Criterion 9(B)(iii) precedent of this Board requires clustering to be considered on a site-specific basis, as opposed to a perspective that looks at community-wide land use planning that may call for denser development in growth areas for the purpose of preserving open spaces in more outlying areas (i.e., community-wide "clustering"). *See, e.g., Re: Nile and Julie Duppstadt*, #4C1013(Corrected)-EB, Findings of Fact, Conclusions of Law, and Order at 40 (Apr. 30, 1999); *Re: Thomas W. Bryant*, #4C0795-EB, Findings of Fact, Conclusions of Law, and Order at 27 (Jun. 26, 1991); *Re: Marvin T. Gurman*, #3W0424-EB, Findings of Fact, Conclusions of Law, and Order at 20 (Jun. 10, 1985); *Re: Spear Street Assocs.*, #4C0489-1-EB, Findings of Fact, Conclusion of Law, and Order at 13-14 (Oct. 26, 1982), *aff'd*, *In re Spear Street Assocs.*, 145 Vt. 496 (1985). While I may disagree with the absolutist nature of Board precedent requiring on-site clustering, predictability and consistency require some adherence to the principles of *stare decisis*. Thus, I would not allow an applicant to avoid on-site clustering by relying upon the vague concept of community-wide "clustering."

Nonetheless, I do believe that the preeminent role which has been given to the clustering of development under Criterion 9(B)(iii) is not borne out by the plain statutory language. Section 6086(a)(9)(B)(iii) requires, by its express terms, that "the subdivision or development has been planned to minimize the reduction of agricultural potential by providing for reasonable population densities, reasonable rates of growth, and the use of cluster planning and new community planning to economize on the cost of roads, utilities and land usage … ." Thus, clustering is merely one of many factors to be considered under this criterion.

When a project is located in a growth center, municipal planning has presumably decided what population densities are appropriate in what parts of the community, and what rates of growth are desirable. In-fill development within growth centers also takes advantage of existing municipal infrastructure in a way that is wholly consonant with the goals of new community planning and smart growth principles such that development pressure in the nature of undesirable sprawl is reduced. As we have seen in this case and in *Re: Allen Brook Investments, LLC*, #4C1110-EB, Findings of Fact, Conclusions of Law, and Order (Jan. 27, 2004), elevating on-site clustering to a preeminent role not required by the statute actually thwarts the very smart growth goals that local communities are being encouraged to pursue. Therefore, I do not believe that 10 V.S.A. §6086(a)(9)(B)(iii) imposes an absolute and mandatory clustering requirement without regard for the growth center location of a proposed project.

My dissent in this case does not turn, however, on whether one follows Board precedent and requires on-site clustering, or whether one agrees with Reynolds' contention that clustering beyond the strict boundaries of the project site can be considered. For the reasons stated in the *Allen Brook* dissent, I believe that allowing the use of off-site mitigation agreements as a method for satisfying Criterion 9(B) is appropriate -- without requiring clustering of any sort -- when a proposed project (1) is located in a planned growth center served by municipal infrastructure, and (2) is

already surrounded by development of equivalent intensity. *Re: Allen Brook Investments, supra,* at 21 - 24. Therefore, were an appropriate off-site mitigation agreement to be executed, because the Project meets subcriterion (ii) and (iv), as mandated by *Southwestern Vermont Health Care Corporation*, #8B0537-EB, Findings of Fact, Conclusions of Law, and Order (Feb. 22, 2001), I would deem the requirements of subcriterion (iii) to be satisfied, and thus would conclude that Criterion 9(B) is satisfied in this matter.

I also note that a five-member majority of the Board rendering a decision on this project concludes that, under proper circumstances (which are not present here in the view of our Chair), growth center projects may avoid any clustering requirement under Criterion 9(B)(iii) through the use of off-site mitigation agreements. This five-member majority includes two Board members (Members Holland and Nowak) who did not participate in the *Allen Brook* decision. Regrettably, for all involved, this issue was not addressed during the most recent legislative session. It will now be left to applicants, other parties, district commissions, and others, to sort through the meaning of *Allen Brook* and this case as they proceed to evaluate growth center projects in the future. I wish all well in this endeavor.

I am authorized to state that Board Member Marsh joins in this dissent.

Board Members Holland, dissenting in part:

Although I did not participate in the *Allen Brook* decision, I join in Board Member Roy's dissent.

Board Member Nowak, dissenting.

I join Board Member Roy's dissent as to Criterion 9(B)(iii) in this matter, although I did not participate in the *Allen Brook* matter. I also dissent from the majority's decision as to Criterion 9(B)(i). I find the testimony of Reynolds' witnesses on subcriterion (i) to be credible.

I further agree with Reynolds' contention that subcriterion (i) guarantees a landowner's right to a reasonable return on the fair market value of his land. Criterion 9(B)(i) does not stand for the position that, merely because one *might* be able to scratch out a living by devoting a tract of land to agricultural purposes, one *must* do so in order to satisfy the subcriterion. I find it impossible to believe that the drafters of Act 250 intended to deny farmers the opportunity to convert their farm land (which is often their greatest financial asset) from agriculture to more profitable ends, merely because some may deem that such land has a greater value in agricultural production than it does in providing needed relief from the housing shortage which exists in Chittenden County.

I am authorized to state that Board Member Roy joins in this dissent.